

Mozambique's new Mining Law and the key changes it introduces

Mozambique's mining sector, particularly its substantial unexploited coal deposits in the central province of Tete, has recently attracted significant attention from international mining companies. Recognising this potential, a new Mining Law (Law No. 20/2014) was published on 18 August. In this briefing we summarise the key changes made to the Mozambican legislative regime by the new Mining Law and discuss its potential impact on investors in the mining sector.

The Mozambican market

Mozambique has vast reserves of untapped coal – the Moatize coal mine in the Tete Province is currently the fourth largest in the world. The World Bank forecasted in its latest report that, by 2032, Mozambique could generate up to \$9bn in revenues from its natural resources, in particular coal and gas, as demand from India and China continues to grow.

Recognising this potential, the Mozambican Parliament approved a new Mining Law (Law No. 20/2014), which was published on 18 August 2014 in Mozambique's Official Gazette (*Boletim da República*) (1st Series – No. 66) and entered into force on the same day (**new Mining Law**), repealing the previous Mining Law (Law No. 14/2002).

In July 2014, after experiencing, among other things, transportation difficulties, Rio Tinto decided to sell the entirety of its coal interests in Mozambique. Despite these difficulties, however, international mining corporations, such as Vale from Brazil and Coal India, are continuing to invest heavily in Mozambique.

In order to improve the existing poor infrastructure to unlock the coal from the Tete Province, Vale has opted to develop a new corridor that includes the building and rehabilitation of a railway line (from Moatize to Nacala) and a new coal terminal at Nacala. Other alternatives to the existing Sena-Beira Line (on which an expansion is also planned) are also under discussion. In particular, another railway corridor and associated port (from Moatize to Macuse) is being designed by the consortium Thai Moçambique Logística, which recently announced this as being a "low cost logistics solution" to transport coal located in Moatize.

Regulatory institutions

Several key bodies are currently responsible for regulating mining activities, namely the Council of Ministers, the Ministry of Mineral Resources (*Ministério dos Recursos Minerais*) (**MIREM**) and the National Directorate of Mines (*Direcção Nacional de Minas*) (**NDM**).

The Council of Ministers, the highest governmental body in Mozambique, includes the president, prime minister and other government ministers and is responsible for creating primary legislation for the mining sector. The Council of Ministers is also



technically responsible for the granting of concessions and mining licences, the process of which is run by NDM.

On a day-to-day basis, the sector is primarily governed by MIREM, which is responsible for overseeing NDM and the new regulatory body, the National Institute of Mines (*Instituto Nacional de Minas*) (**INM**). MIREM develops and implements policies relating to the exploration and production of mineral resources, including minerals and metals.

NDM was established to manage and oversee Mozambique's mining sector and is responsible for, among other things:

- developing public policy in respect of the mining sector;
- regulating and monitoring the implementation of new mining projects;
- managing the day-to-day process for the allocation of concessions and licences, including overseeing any public procurement process;

- monitoring and mitigating the potential social and environmental impacts of mining projects;
- developing and enforcing health and safety standards in the mining sector; and
- promoting the international exportation of minerals and metals from Mozambique.

Pursuant to the new Mining Law, the Mineral Resources General Inspection is responsible for overseeing compliance with that law and any other legislation, regulations and national standards governing mining activities.

In addition, the new Mining Law provides that a new authority, the High Authority for the Extractive Industry (*Alta Autoridade da Indústria Extractiva*), will be created to oversee the extractive industry. That said, the new Mining Law is silent as to the powers and role of this High Authority. In particular, it is uncertain as to whether the new authority will be regulatory in nature or will take the role of ombudsman and/or whether its role will conflict or overlap with NDM and/or the Mineral Resources General Inspection.

INM was established by the new Mining Law to regulate mining activities and its primary responsibilities include:

- the review, analysis and approval of mining projects, including carrying out technical and economical studies for the opening of new mines, in addition to decommissioning and/or the closure of mines;
- minimising the social and environmental impacts of mining projects;
- publishing guidelines on public and private sector participation in the mining sector;
- proposing new policies to MIREM regarding the development of the mining sector; and
- promoting, reviewing and supporting other institutes in relation to mining sector activities, including small-scale mining.

The new Mining Law

Scope

- As per the previous regime, all mineral resources found in the soil and subsoil, inland water, territorial sea and continental shelf within Mozambique are the property of the State.
- In addition, the new Mining Law provides that mineral water is expressly included within the scope of the new mining regime.
- The new Mining Law clarifies that activities concerning the industrial processing of raw materials from mining operations are subject to specific legislation.
- The new Mining Law expressly excludes oil, natural gas, methane gas and natural gas from its scope. Such hydrocarbons are governed by the new Petroleum Law.¹



Local requirements

- Under the new Mining Law, a percentage of revenues generated to the State by mining activities shall be allocated by the State to the development of communities located near mining activities. This percentage will be fixed in each State Budget and will depend upon the expected annual State revenues to be generated via the mining sector.
- The new Mining Law provides that in granting rights for mining activities in Mozambique, the State shall always consider the national interests of Mozambique, in particular in relation to the conservation of natural resources, environment, domestic economic activities and food and nutritional needs.
- The new Mining Law provides that, when mining activities require the relocation of local communities already established in the area of the mining activities, the relevant licence holder must pay fair and transparent compensation, the details of which will be established in a memorandum of understanding between the licence holder, the State and the community. Where relevant, such memorandums of understanding will be a condition to the allocation of any mining exploration rights.
- The new Mining Law provides that, unless technical evidence confirms that mineral reserves exist in the area, any relocation of local communities must be temporary only.
- Further, the new Mining Law provides that ongoing dialogues should be maintained between licence interest holders and local communities.

¹ For an overview of the new Petroleum Law (Law No. 21/2014),

please see the "New Petroleum Law: The Future of Oil & Gas in Mozambique" client briefing published on 15 October 2014.

- Pursuant to the new Mining Law, the Mozambique Government is required to create mechanisms which promote local investment in mining projects.
 - Under the new Mining Law, preference should be given to goods and services purchased or obtained from Mozambican individuals or entities. Further, the new Mining Law requires that goods or services, the value of which exceeds a particular amount (to be determined in subsequent regulations), must be purchased by way of a public tender. Such public tenders must be published in widely read newspapers in Mozambique and on the website of the relevant interest holder.
 - In addition, foreign entities that provide services to mining operations in Mozambique are required under the new Mining Law to "associate with" Mozambican entities. Details of how this obligation is to be fulfilled remain unclear and we expect this to be detailed in future regulations and/or secondary legislation.
 - Pursuant to the new Mining Law, should a rights holder discover that a site is of geological or archaeological importance, it must adopt the necessary measures to preserve such archaeological finds. Upon such a discovery, the rights holder must subsequently request authorisation from the competent entity for the proper removal of such discoveries, the mechanics of which are not fully provided within the new Mining Law.
 - The new Mining Law provides that mining companies must be listed on the Mozambican Stock Exchange (*Bolsa de Valores de Moçambique*) on terms to be further detailed in regulations. It is uncertain as to whether this refers to a specific percentage of a project SPV, as per similar local content requirements in other jurisdictions, or whether all of the shareholding of the company is to be listed on the Mozambican Stock Exchange. In advance of further clarification being provided in subsequent regulations, it is recommended that potential investors should consult directly with the Mozambican authorities to obtain further guidance.
- Investment protection**
- The Mozambique Investment Law (Law No. 3/93) does not provide protection to investments relating to the mining sector. To rectify this, the new Mining Law expressly provides for the protection of both national and foreign direct investment in the mining sector in respect of the protection of property rights from undue and unfair expropriation.
 - Provided that it can be valued in monetary terms, foreign and national direct investment protected by the new Mining Law may be in one of the following forms:
 - (a) an amount paid in a freely convertible currency for the acquisition of equity interests in a company incorporated in Mozambique, or of a mining title, provided that the value is paid at a bank registered in Mozambique or into an external account authorised in terms of foreign exchange law;
 - (b) equipment and respective accessories, materials and other imported goods;
 - (c) in the case of national direct investment, infrastructure, installations and the transfer of rights relating to land use, concessions, licences, and other rights of an economic, commercial or technological nature;
 - (d) the transfer or grant, in specific cases and on terms agreed upon and authorised by the relevant Mozambican competent entities, of rights to use patented technologies and registered trademarks on terms to be further detailed in regulations;
 - (e) principal and interest on any loans, previously approved by the Mozambique Central Bank (*Banco de Moçambique*), obtained from the international financial market and applied by way of investment made in Mozambique; and
 - (f) sums related to the payment of obligations to non-resident entities.
 - Protections afforded by the new Mining Law include the protection of property rights and activities granted under any mining permits, the protection against undue and unfair expropriation without fair compensation and the protection of the transfer of funds outside of Mozambique.
 - Although the applicability of these protections extend beyond what is usually offered by way of international treaties, the extent of these protections is somewhat lacking. For example, if justified by public interest and subject to the payment of fair compensation, expropriation is allowed under the new Mining Law in exceptional circumstances. As a result, foreign investors should also consider utilising protection provided by way of Bilateral Investment Treaties when structuring their investments.
- Decommissioning**
- The new Mining Law provides that mining operations may not be closed or abandoned without the prior execution of a rehabilitation and mine closure plan which has been approved by the competent authority.
 - In certain instances, rights holders may be required to issue performance bonds or other guarantees in respect of decommissioning. Such issue may be called upon if the rights holder does not fulfil its decommissioning obligations.
- Liability**
- The new Mining Law provides that rights holders are required to compensate third parties in respect of any damage to land and property resulting from any mining operations.
 - The new Mining Law does not clarify whether this only applies in circumstances where the rights holder has acted unlawfully, negligently or below the standards expected of a prudent operator. If not, this rule could constitute a strict liability regime for damages and result in significant liabilities being incurred by rights holders.
- Transparency**
- The new Mining Law provides that companies applying for concessions or licences must provide evidence of incorporation and shareholders, including details of relevant shareholdings.

Data ownership

- The new Mining Law provides that all and any data or information obtained under any licence or mining contract shall be deemed to be the property of the State. Details of the terms and conditions in relation to the State's exercise of its deemed rights over such data and information will be provided in further regulations and/or secondary legislation. As such, those potential investors considering establishing only exploration operations in Mozambique would need to establish whether this would be commercially acceptable.
- Further, the new Mining Law provides that the Government shall be responsible for announcements concerning the discovery of mineral resources. As no further details are provided within the new Mining Law in respect of the announcement of discoveries, investors should consider this alongside announcement and disclosure obligations they might have under any relevant market and listing rules.

Illegal sale, purchase or transportation of minerals

- Any sale, purchase or transportation of mineral products outside of Mozambique without prior authorisation or permission or other than as allowed by law is a criminal act and may be punishable by imprisonment for a period of between 8 and 12 years and might be aggravated when the value of the mineral products is superior to one thousand minimum wages.

Use of explosives

- The new Mining Law provides that explosives may be used in relation to mining activities in Mozambique, though such usage will be subject to specific Mozambique legislation and regulations and requires obtaining prior authorisation from relevant authorities.

Traditional purposes

- The extraction of resources for use as building materials relating to "traditional purposes" does not require a mining licence or any other authorisation, provided that such extraction:
 - (a) is undertaken by a Mozambican citizen in a way that complies with local customs in a land where it is common to carry out such extraction;
 - (b) is to be used for the construction of housing, warehouses or other facilities; and/or
 - (c) is for ceramic homemade production.

Licensing regime

Under the new Mining Law, a prospective investor may obtain the following types of holding licences:

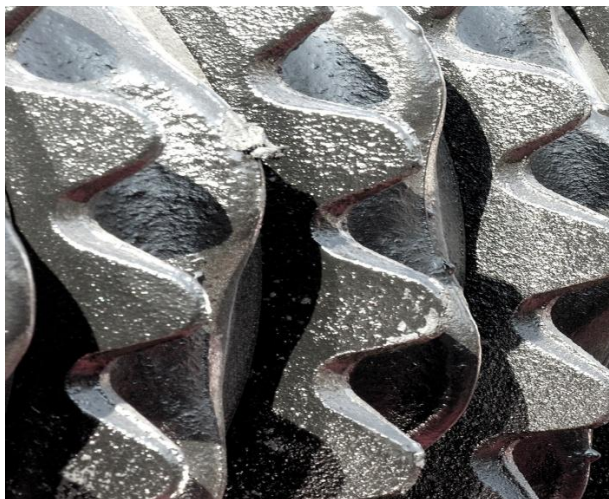
1. **Exploration Licences** (*licenças de prospecção e pesquisa*) – Exploration Licences govern any exploration and prospecting activities. Exploration Licences will be valid for:
 - (a) two (2) years for mineral resources being supplied for the construction industry, renewable once for same period; or
 - (b) five (5) years for other mineral resources, including mineral water,

and may be renewed once for an additional three (3) year period.

2. **Mining Concessions** (*concessões mineiras*) – Mining Concessions provides the concessionaire (incorporated and registered under Mozambican law) the right to extract, develop and process mineral resources which are discovered under an Exploration Licence. Mining Concessions will be valid for a period of 25 years and may be extended by another 25 years.
3. **Mining Certificates** (*certificados mineiros*) – Mining Certificates govern small-scale mining operations. Mining Certificates are only granted to Mozambican nationals, in addition to legal entities and will be valid for a period of 10 years and may be extended by another 10 years.
4. **Mining Treatment Licences** (*licenças de tratamento mineiro*) – In circumstances when the investor does not hold a valid Mining Concession, Mining Certificate or Mining Pass to authorise such activities, Mining Treatment Licences govern the mining processes through which usable ore and derivatives are recovered in valuable mining products by physical treatments. The treatment of radioactive minerals (e.g. uranium) will require further authorisations in accordance with legislation regarding atomic energy and radioactive materials.
5. **Mining Processing Licences** (*licenças de processamento mineiro*) – In circumstances when the investor does not hold a valid Mining Concession, Mining Certificate or Mining Pass to authorise such activities, Mining Processing Licences govern those processes required to achieve ore concentrate by means of (among others) physical, chemical and metallurgical treatments. The processing of radioactive minerals (e.g. uranium) will require further authorisations in accordance with legislation regarding atomic energy and radioactive materials.
6. **Mining Products Commercialisation Licences** (*licenças de comercialização de produtos minerais*) – Mining Products Commercialisation Licences govern the activity of the sale and purchase of mineral products sourced from outside of Mozambique. We note that Mining Products Commercialisation Licences may be awarded to Mozambican nationals in addition to legal entities.
7. **Mining Passes** (*senha mineira*) – Mining Passes govern "artisanal" mining operations generally being undertaken by individuals, and allow for the sale of mineral products arising from such small-scale mining activities. We note that Mining Passes may be awarded to Mozambican nationals, in addition to legal entities.

Save for Mining Passes and Mining Products Commercialisation Licences, only entities incorporated and registered in accordance with Mozambican law that are able to provide evidence of their technical and financial capacities are eligible for any licence under the new Mining Law. As noted above, Mining Passes and Mining Products Commercialisation Licences may also be awarded to Mozambican nationals (i.e. natural persons).

The new Mining Law itself does not provide further detail as to the length of validity for Mining Treatment Licences, Mining Processing



Licences and Mining Products Commercialisation Licences. As such, it is expected that further details regarding these licences will be provided by way of future regulations or secondary legislation.

Mining contracts

Pursuant to the new Mining Law, the Government of Mozambique may launch a public tender in respect of entering into public-private undertakings in relation to mining activities with the holder of an Exploration Licence or a Mining Concession (a **Mining Contract**).

The Mining Contract must contain clauses regarding:

- (a) the level of participation of the Government of Mozambique in the undertaking;
- (b) minimum local content;
- (c) local employment and training requirements;
- (d) incentives in relation to increasing the value of the minerals to be extracted;
- (e) corporate social responsibility requirements;
- (f) memorandum of understanding between the licence holder, the State and the community;
- (g) disputes resolution mechanics, including provisions relating to the settlement of disputes by way of arbitration; and
- (h) the way that the communities in the area will be involved in and benefit from the undertaking.

The new Mining Law provides that Mining Contracts must be published in the Mozambique's Official Gazette and are subject to the Administrative Court's prior approval.

It is uncertain as to whether such Mining Contracts will be standardised or whether each Mining Contract can be individually negotiated. As such, potential investors considering entering into a Mining Contract should fully consider the allocation of risk under the proposed Mining Contract.

Further, Mining Contracts awarded by way of public tenders require the payment of an award fee to the Government of Mozambique. As the new Mining Law does not provide any further details regarding such award fees, it is recommended that

investors considering bidding for a Mining Contract under a public tender process should first ascertain the amount of such award fee, in order to be able to properly value the price of their bid.

Transfer of rights

The transfer of title, rights and obligations under a mining licence, whether to an affiliate or a third party, may only take place two years after the commencement of the relevant mining activities authorised by the mining licence. Such transfers must be in accordance with Mozambican law and will be subject to the approval of the Government of Mozambique.

The new Mining Law expressly provides that indirect transfers of participating interests, titles and/or mining rights, notably by way of change of control of any licence holder, shall be considered as a transfer of rights and obligations under a mining licence and shall, therefore, require prior governmental approval.

Non-compliance with any transfer requirements will result in any such transfers being void and invalid.

Such transfers of rights may also be subject to the payment of capital gains tax. As of 1 January 2014, capital gains derived from the sale of shares of a resident company by a non-tax resident are taxable. Further, tax relief depending on the holding period of the shares which was previously available has now been repealed.

Environmental impact assessments

Under the new Mining Law, mining activities are classified as Category A, Category B and Category C.

The new Mining Law indicates that differing levels of environmental impact assessments are required for each classification of mining activities. That said, no further details are provided as to the substantive requirements for each type of environmental impact assessment and how these obligations may be fulfilled.

Rights acquired under the previous regime

It is noted that all rights obtained under concessions entered into under the old Mining Law shall remain valid and unaffected by the new Mining Law.

Notwithstanding this, mining licence holders may opt to be fully governed by the new Mining Law, provided that they convey such intention within a period of 12 months from the date of entry into force of the new Mining Law (i.e. by 18 August 2015).

State participation

Pursuant to the new Mining Law, the State is required to progressively increase its participation in mining projects.

Nevertheless, the new Mining Law is unclear as to whether this means that the State shall be a larger participant in mining projects in the future, or whether the State is expected to obtain greater interests in particular projects over time.

Domestic supply obligations

Pursuant to the new Mining Law, mineral resources should be used, wherever necessary, as a fuel for electricity generation or as raw materials for the manufacturing industry in Mozambique. This is provided as a general obligation and the new Mining Law does not provide a specific percentage in respect of the minimum requirement of resources to be provided to the domestic market.

Further, the new Mining Law does not clarify whether this will be fulfilled by the involvement and activities of the Mozambique Government or whether rights holders must keep this in consideration when marketing minerals extracted in Mozambique.

Employment of non-Mozambican nationals

Since 7 December 2011, pursuant to Decree No. 63/2011, the criteria for the hiring of foreigners citizens have been adapted for the mining sector to ensure that more qualified workers are attracted to mining operations.

The new Mining Law introduces new requirements for mining companies regarding the hiring of workers and employees. Adverts shall be published in newspapers with a wide readership, or through radio, television and the internet, indicating the place of application, required experience and/or qualifications, and details of the publication of results. This requirement, however, does not appear to apply to sub-contractors.

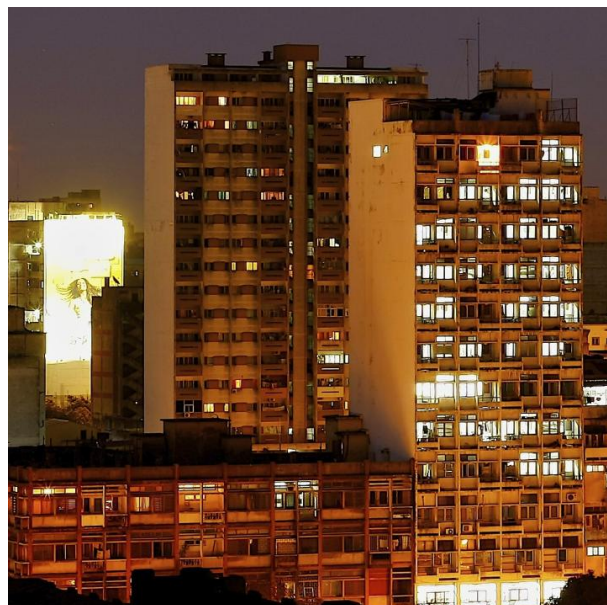
Further details on this regime are expected to be provided through subsequent regulations.

Fiscal regime

Under the new Mining Law, concessionaires shall pay, along with any relevant specific taxes on petroleum operations:

- Income Tax;
- Value Added Tax;
- Production Tax;
- Surface Tax;
- Municipal Tax, where applicable; and
- any other relevant taxes required by law.

On 21 August 2014, the Mozambique Parliament approved the enabling law in respect of the Specific Regime of Taxation and Fiscal Benefits for Mining Operations, which will provide further specifics on relevant taxes relating to the mining sector and will repeal the current regime (Laws No. 11/2007 and No. 13/2007 of 27 June 2007). The Specific Regime of Taxation and Fiscal Benefits for Mining Operations is due to enter into force on 1 January 2015.²



Conclusion

The new Mining Law makes a number of key changes to the mining regime in Mozambique, in particular regarding the licence regime. Nevertheless, many significant uncertainties remain concerning the rules and regulations governing the sector and a number of provisions within the new Mining Law may prove difficult for investors to navigate.

That said, it is likely that outstanding uncertainties will be addressed by subsequent regulations and secondary legislation.

Given the significant potential of natural resources in Mozambique, the regulatory regime governing its mining sector is expected to continue to develop and mature in the near future.

² An additional Client Briefing on the Specific Regime of Taxation

and Fiscal Benefits for Mining Operations will be published upon its entry into force.

For more information about "Mozambique's new Mining Law and the key changes it introduces", please contact:

Clifford Chance

James Pay

T: +44 (0)20 7006 2625
E: james.pay
@cliffordchance.com

David Lewis

T: +44 (0)20 7006 1903
E: david.lewis
@cliffordchance.com

André de Sousa Vieira

T: +44 (0)20 7006 1210
E: andre.desousavieira
@cliffordchance.com

Philip Walsh

T: +44 (0)20 7006 3361
E: philip.walsh
@cliffordchance.com

Couto, Graça & Associados

Pedro Couto

T: +258 21 496900
E: pcouto
@cga.co.mz

Jorge Graça

T: +258 21 496900
E: jgraca
@cga.co.mz

Faizal Jusob

T: +258 21 496900
E: fjusob
@cga.co.mz

Paulo Ferreira

T: +258 21 496900
E: pferreira
@cga.co.mz

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2014

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please send either an email to nomorecontact@cliffordchance.com or a letter by post to Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.